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October 28

SEP 22 1998

CONCORD, N.H.

Mr. James J. Barry, Commissioner  
Department of Public Welfare  
State House Annex  
Concord, New Hampshire

Dear Mr. Barry:

You have inquired as to my opinion respecting the applicability of fair trade contracts to the purchase of drugs by assistance recipients and paid for by the State of New Hampshire. It is my opinion that such a transaction is subject to a fair trade contract and the fair trade law.

The fair trade law, RSA 357, in substance provides that no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class shall be deemed in violation of any law of this state by reason of the fact that a minimum resale price is stipulated therein. A reading of the said chapter 357 indicates that the obligations and duties are all imposed upon the vendor of an appropriate commodity. It recognizes the validity of a contract which prohibits a vendor from selling below a minimum stated price and subjects him to a penalty if such a sale is made.

Thus a vendor, who is subject to a valid fair trade contract, sells at below the stipulated price at his peril regardless as to whom the sale is made.

Exemptions and exceptions may be contained in the fair trade laws as to persons to whom sales may be made not subject to the price restrictions. An exemption may be made for sales to governmental agencies but such an exemption will not be read into the law as the legislature could well have provided for one by specific language. 37 CJS Trade Marks, Trade Names, and Unfair Competition, s. 251.

Very truly yours,

Richard C. Duncan  
Assistant Attorney General

RCD/T

cc: Alan Pope,  
Administrative Assistant